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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1963~~ 1964

NO. 346

FAIR SHARE ORGANIZATION, INC.,
An Indiana Corporation,
Petitioner,

VS.

MOPRIS MITNICK, d/b/a Central
Fourth Street Drugs,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF INDIANA

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NO.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF INDIANA

Petitioner Fair Share Organization, Inc., an Indiana corporation, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana, which affirmed by mandate to the Appellate Court a judgment for a permanent injunction and $5,000.00 in damages on May 26, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court (R. III), printed in Appendix A hereto, infra, p. 1a, is reported in 198 N. E. 2nd 765.

The opinion of the Appellate Court in a companion decision, (R. IX), on a temporary injunction, printed in Appendix B hereto, infra, pp. 5a-14a, is reported in 188 N. E. 2nd 840.

JURISDICTION

The judgment of the Appellate Court of Indiana on an interlocutory appeal from the granting of a temporary injunction by the trial court, was entered on March 19, 1963 (R. IX), p. 5a-14a, infra. Rehearing was denied on April 4, 1963. Petition to transfer to the Supreme Court of Indiana was denied on June 18, 1963, (R. III). The Supreme Court remanded to the Appellate Court a judgment of $5,000.00 and a permanent injunction with a mandate to affirm on May 26, 1964.

The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1257, Sec. (3), which rights of free speech and association guaranteed by the 14th Amendment of the United States Constitution were denied on the ground that the Petitioner's purpose for picketing was unlawful.

A ministerial act remained to be done; therefore, the decree of the Supreme Court was final and immediately reviewable. See: Board of Commissioners vs. Lucas, 93 U. S. 108.

QUESTION PRESENTED

In an action for a temporary and permanent injunction under the Indiana Anti-Injunction Statute, 40-501 through 40-514, where an employer advertised in a local daily newspaper for a cosmotician and clerk and his statement is uncorroborated by other witnesses or signs that a Negro officer of an Indiana Civil Rights organization demanded the discharge of a white person and the employment of a Negro clerk, which was emphatically denied by three Negro representatives of the organization and Respondent's inde-

pendent witness failed to hear such a demand, with Respondent's trial statement that he failed to attempt to negotiate the issue of hiring a Negro clerk, superimposed upon the complete devoidance of any evidence that the organization either participated in, authorized or ratified any unlawful act after knowledge thereof, the question presented is:

1. Whether the Petitioner has been afforded due process, which includes free speech and association and equal protection of the laws, as guaranteed by the Fourteenth Amendment of the U. S. Constitution.

CONSTITUTIONAL AMENDMENT INVOLVED

The constitutional amendment involved is the 14th, Section 1.

It is printed in Appendix C, infra, p. 14a.

STATUTE INVOLVED

The statutory provisions involve Sections 40-501—40-514 of the Indiana Anti-Injunction Statute, which pertinent sections are printed in Appendix D, infra, pp. 15a-17a.

STATEMENT OF FACTS

The facts are in substance that Petitioner, an Indiana corporation, was formed on May 11, 1959, as a non-profit organization for the purpose of obtaining political, economic, social, and civic equality through lawful means, and to awaken the masses of Negroes to their potentials through collective action. A Michigan City branch was chartered by the main office at Gary, Indiana, on September 21, 1961.

On or about the 19th day of September, 1961, Respondent placed a blind ad for an experienced cosmotician and clerk in the Michigan City News Dispatch Newspaper. (R., p. 104, l. 7-p. 105, l. 1)

Members of the Michigan City branch approached Respondent on September 27th, 1961, concerning the

employment of a Negro clerk, there being an opening for an experienced girl in cosmetics and drugs, which was admitted by the Respondent at the trial. (R., p. 122, l. 9 to l. 17)

Respondent had been in business for 15 years with approximately 15% Negro business and had employed a Negro janitor for four hours on Saturdays during the evening for six years. (R., p. 62, l. 4-l. 30)

Prior to the discussion with members of the Michigan City branch, Marie Nannie Allison, Respondent's friend for three years, explained to him on September 27, 1961, that members of said organization were planning to visit him concerning his hiring policies in regard to Negroes. To which the Respondent replied, "Well, tell them to put on a picket line." (R., p. 260, l. 26-p. 262, l. 14)

After approaching the Respondent on September 27, 1961, and presenting their credentials, Respondent stated that he said, "I will employ a Negro pharmacist this same afternoon if you can produce one." Respondent further said that they replied, "A Negro pharmacist has dignity and we're not concerned about that, but we want a clerk in your store."

Thereafter, a considerable amount of conversation ensued concerning the employment of a clerk. To which the Respondent said that one Leon Coleman replied, "Well, fire a white one and hire a Negro." (R., p. 65, l. 17 to l. 30) "Further, we'll put you out of business." (R., p. 66, l. 29 to l. 30) Representatives of Petitioner's denied these statements. (R., p. 235, l. 8 to l. 19) Respondent did not tell members of the Michigan City branch that he was in need of an experienced clerk on September 27, 1961, and after a request by Mr. Coleman, co-chairman of the Fair Share Organization, concerning putting his willingness in writing to hire a Negro pharmacist, retorted, "I didn't

have to put it in writing as my word was good as a business man." (R., p. 109, l. 1to p. 110, l. 10)

Thereafter, on or about Sunday, October 8, a Mrs. Jones was stopped. She was told by Mr. Coleman not to go into the store as long as they were picketing. And she replied she had a right to go in there; she had been trading in that store for the past 15 years and she would come in at anytime she wanted to (R., p. 72, l. 13-l. 17)

The signs carried were as follows:

"Don't Buy Segregation";
"We Want Equal Opportunities";
"No Negro Clerks or Salesmen";
"United We Stand";
"Fair Share Organization, Help Fight Segregation, Join Now";
"Don't Spend Your Money Where You Can't Work In Positions of Dignity";
"You Can Help Us Toward Equal Job Opportunities By Staying Out";
"Central Drug Store Discriminates Against Negroes In Michigan City";
"Unfair To Negroes";
"This Store Doesn't Hire Negro Help"; (R., p. 290 to p. 300)

Petitioner's Exhibit No. 2, which was masked and taped to read after the first or second day of picketing;

"No Negro Clerk Or Salesman", which originally read;

"No Negro Clerk Or Salesman In Michigan City". (R., p. 194, l. 26 to p. 195, l. 23 and R., p. 198, l. 29 to p. 201, l. 17)

There were automobiles parked around the corner of the store and 2 trucks with the wording "Help Us

Fight Communism and Fair Share Organization". (R., p. 72, l. 30 to p. 73, l. 7)

Approximately 2 years prior to the picketing, Respondent had a job opening for a pharmacist. Dr. Wendell G. White, a Negro, was not hired because he owned a drug store in Chicago at that time (R. p. 99, l. 1 t. l. 24) Dr. White gave him his address and phone number; however, he has never heard from the Respondent since filing an application (R., p. 246, l. 18 to p. 250, l. 13) He has been in Respondent's store since this incident but has not talked to him further concerning this matter. At present, Dr. White is the manager of a drug store in Gary, Indiana. (R., p. 56, l. 11 to l. 26)

During the picketing and prior thereto, Respondent failed to solicit the services of any governmental agency or attempt in any way to discuss any kind of settlement of this matter with the parties involved. (R., 113, l. 16 to l. 30 and R., p. 125, l. 8 to l. 28).

There was no evidence presented as to whether Leon Coleman, Jr., alleged maker of the statement that Respondent should fire a white clerk and employ a Negro, informed the Board of Directors of the Petitioner corporation at Gary, Indiana, or any officer in authority of such a statement, nor was there any evidence presented as to whether the Petitioner corporation either participated in, authorized, or ratified such a statement or purpose after actual knowledge thereof.

Further, the record is devoid of any evidence of intimidation, fraud, or violence.

HOW FEDERAL QUESTION IS PRESENTED

The question of Petitioner's constitutional rights guaranteed by the Fourteenth Amendment was first raised in Petitioner's answer, assignment of errors,

and discussed by the Appellate Court, which determination of Petitioner's constitutional rights by the Supreme Court of Indiana, is illustrated by the following language at 198 N. E. 2nd, 765, p. 766:

"* * * In the briefs filed in both appeals, appellant states: "What the issues were in identical language, namely:

> "Appellee, Morris Mitnick, d b/a Central Fourth Street Drugs, filed its verified complaint for injunctive relief and $25,000.00 damages, which verified complaint was amended, charging that appellant was unlawfully picketing his said store belonging to appellee.
>
> Appellant filed a verified answer containing denials and averring that the relief sought by Appellee was prohibited by Indiana's Anti-Injunction Act; that Appellant was engaged only in the peaceful dissemination of information regarding a labor dispute without fraud, violence, or other unlawful acts; that Appellant's acts were within the protection of the Fourteenth Amendment to the U. S. Constitution of the United States of America, Article 1, and Sections 9 and 31 of the Constitution of the State of Indiana."
>
> "The condensed recital of the evidence in each case is the same. On the hearing for a permanent injunction, each of the parties herein re-submitted the evidence heard by the trial court on the temporary injunction. No additional or new evidence was heard."
>
> "The constitutional question sought to be determined here was whether there was an infringement of the constitutional right to free speech and picketing. This same question was raised and considered in the previous appeal. * * * " Appendix A, infra, pp. 1a-3a.

REASONS FOR GRANTING THE WRIT

A.

SUBSTANTIAL FEDERAL QUESTIONS ARE REVIEWABLE NOT WITHSTANDING THE LAW OF THE CASE

The Supreme Court of Indiana remanded the immediate case to the Appellate Court with directions that it affirm the judgment of the trial court under the authority of this opinion. On page 766, the court held:

> "Under the circumstances, the principle known as "the law of the case" is applicable here. The decision of a court of appeals rendered upon a given state of facts becomes the law of the case applicable to such state of facts. Of course, upon a new trial, if new evidence is introduced and a new state of facts presented, we have a different case, and the trial court is not conclusively bound by the previous decision; but if the cause is submitted for a retrial upon the same facts upon which the decision was originally rendered, such decision remains the law of the case and the trial court is bound thereby, as well as an appellate court on a subsequent appeal. Egbert v. Egbert et al (1956), 235 Ind. 405, 132 N. E. 2nd 910; 2 I. L. E., Appeals, Sec. 478.
>
> "Appellant, however, contends that upon the hearing of the permanent injunction, as distinguished from the temporary injunction, there is a difference in the quantum of evidence requisite for the granting of the permanent injunction, namely, a preponderance of evidence in the final case, as distinguished from the making out of a prima facie case for holding the parties in status quo

pending the hearing on the permanent injunction. 16 I. L. E., Injunctions, Section 96 * * *."

Petitioner contends that this language is not supported by the evidence, brief on appeal, nor has there been any review of the facts either on the temporary injunction in the Appellate Court or Supreme Court, which latter ordered a mandate of affirmance without a determination of whether there were sufficient facts to support the special findings of fact and conclusions of law, discussed in Petitioner's brief on pages 131 through 156, (Appendix E, pp. 19a-28a).

This determination was made concerning the "law of the case" without apparent regard for the Supreme Court's Per Curiam opinion on June 18, 1963, 191 N. E. 100, which stated as follows:

> "This case is on petition to transfer from the Appellate Court. See Ind. App., 188 N. E. 2nd 840.
> "While agreeing with the result attained in the Appellate Court decision, we do not agree with certain statements and conclusions set forth in the opinion. Transfer denied."

In view of the Supreme Court of Indiana's statements, conclusions, and subsequent actions concerning a review of the evidence supporting the special findings of facts and conclusions of law in this matter, Petitioner submits that much is to be desired in terms of what is the "law of the case."

In Reese V. Georgia, 350 U. S. 85, 100 L. ed. 77, 76 S. Ct. 167, on page 86, headnote 2, this court settled the issue of whether decisions under a state court ruling pertaining to "law of the case" is reviewable.

> " * * * We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, Urie v. Thompson, 337 U. S. 163, 172, 173, 93 L. ed. 1282, to re-examine

such questions is not affected by a ruling that the first decision of the state court became the law of the case, Davis v. O'Hara, 226, U. S. 314, 69 L. ed. 303, 45 S. Ct. 104 * * *."

B.

THE RECORD IS DEVOID OF SUBSTANTIAL EVIDENCE TO SUSTAIN A JUDGMENT UNDER THE INDIANA ANTI-INJUNCTION STATUTE, DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION

1. The decisions of the court below in the instant case, and in Hughes v. Superior Court, 1950, 339 U. S. 460, 461, 70 S. Ct. 718, 719, 94 L. ed. 985, upon the authority of which the instant case was decided are directly in conflict with the decision of this court in New Negro Alliance, et al v. Sanitary Grocery, Inc., 1938, 303 U. S. 552, 58 S. Ct. 703, 82 L. ed. 1012, both in principle and in fact. In the Hughes case, the majority of the court sustained the opinion of the lower court on the basis that Petitioner and Respondent agreed that the purpose of the picketing was to enforce proportional hiring and the signs referred to the failure of Lucky to hire on a proportional basis. Further, there was no anti-injunction statute declaring the public policy of the state of California.

In the New Negro Alliance case, which is similar to the case at bar, the Norris LaGuardia Act was involved and the purpose of the picketing was to change existing policies of the Sanitary Grocery. The purpose of the picketing was not to force the hiring of anyone, but simply to change the existing policies concerning hiring, which the courts of Indiana failed to consider in the case at bar, or to review matters of evidence from which the court could have ascertained

that the statements attributed to Coleman were ridiculous, if not shocking, when reconciled with other evidence and the fact that Coleman, Respondent, and the community knew that Respondent was in need of a clerk. (See: Thompson v. City of Louisville, 362 U. S. 199; Gardner v. Louisiana, 368 U. S. 157, 663; Norris v. Alabama, 294 U. S. 587, 590; Fiske v State of Kansas, 274 U. S. 380, 385-6; and Carlson v. Washington, 234 U. S. 103)

Referring to the duty of the Appellate and Supreme Courts of Indiana to make an independent examination of the whole record, the Appellate Court in Inland Steel v. Harris, 1911, 49 Ind. App. 157, 95 N. E. 271, said:

> " " " Where there is legal evidence tending to support the finding of the jury, upon all questions at issue, the Appellate Court will not weigh the **evidence, unless it is of such a character that to believe it would involve an absurd or unreasonable conclusion."**
>
> (Petitioner's Emphasis)

In the case at bar, it is not just a question of weighing the evidence, (Dixon v. State, 1946, — Ind. —, 67 N. E. 2nd, 138) but one of determining whether there is any evidence to support the special findings of facts and conclusions of law. (See: Appendix E, infra, pp. 20a-28a)

2. The decision of the court below is further believed to be erroneous and in conflict with Karges Furniture Co. v. Amalgamated Woodworker's Local Union No. 131, 75 N. E. 877, 165 Ind. 421, certain general provisions of the Anti-injunction Statute, and specifically Sections 40-508 and 40-508. (See Appendix D, infra, pp. 16a-17a).

In the Karges case which is similar to the case at bar in principle, if not in fact, the Indiana court refused an injunction against the labor union although

14 members of the union were guilty of acts of intimidation and violence during the strike while lounging in the street and not while serving as pickets (See: Appendix D, infra, p. 16a, Section 40-506)

While interpreting a similar provision of the Federal Anti-Injunction Act, the court in General Electric Company v. Gojack, 68 Fed. Sup. 686, held in substance that an employer was not entitled to an injunction in cases growing out of labor disputes, notwithstanding that it was shown that executives and supervisors were prevented from entering its plants because of illegal picketing by union employees; and that police charged with protecting employer's property were derelict in their duties, where it did not appear that the employer had made a good faith effort to settle the dispute by negotiation. (See Appendix D, infra, p. 17a, Section 40-508)

2. Clearly, the question of Petitioner's right of free speech and assembly is of grave importance not only to the Negroes of Indiana, but America, and this standing decision could well freeze out of existence all protests and activity on behalf of the civil rights of Negro citizens. (See: NAACP v. Burton, Va., 1963, 83 S. Ct. 328, 371 U. S. 415, 9 L. ed. 2nd 405, and NAACP v. Alabama, ex rel. Patterson, 357 U. S. 449, 78 S. Ct. 1163, Edwards v. South Carolina, 83 S. Ct. 680, 372 U. S. 229, 9 L. ed. 2nd 697, Lombard, et al v. State of Louisiana, 10 L. ed. 2nd 338. The desire to stifle the efforts of Civil Rights organizations could well become the father of alleged illegal demands made at the bargaining table which would tend to discourage rather than encourage full faith negotiations prior to picketing; Mr. Justice Harlan's enunciation in the dissent of NAACP v. Burton, 9 L. ed. 405, at page 430, would become meaningless:

" * * * An analogy may be drawn between the present case and the rights of workmen in labor

disputes. At the heart of these rights are those of a laborer or labor representative to speak; to inform the public of his dispute and to urge his fellow workers to join together for mutual aid and protection. **So important are these particular rights that absent a clear and present danger of the gravest evil, the state is not only without power to impose a blanket prohibition on their exercise, Thornhill v. Alabama, 310 U. S. 88, 84 L. ed. 1093, 60 Sup. Ct. 736, but also may not place any significant obstacle in their path. Thomas v. Collins, 324 U. S. 516, 39 L. ed. 430, 65 Sup. Ct. 315."**

(Petitioner's Emphasis)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Hilbert L. Bradley and
Charles P. Howard, Jr.
Counsels for Petitioner

APPENDIX A

FAIR SHARE ORGANIZATION, INC. v. MORRIS MITNICK, D/B/A CENTRAL 4th STREET DRUGS

Supreme Court of Indiana

No. 30596

May 26, 1964

Appeal From La Porte Superior Court

Hon. Roy Sheneman, Special Judge

Per Curiam

This appeal comes to us by transfer from the Appellate Court under Cause Number 20,153 on the ground that a constitutional question is involved.

It appears from the record that the appellee-Mitnick brought an action against the appellant to enjoin the appellant temporarily and permanently from picketing appellant's place of business. After a hearing on the merits for the temporary injunction, the trial court granted the same. From this interlocutory decree appellant appealed. The appeal was affirmed in an opinion by the Appellate Court on March 19, 1963,—— Ind. App.——, 188 N. E. 2nd 840, (1 Ind. Dec. 180)*. We denied transfer on June 18, 1963, —— Ind.——, 191 N. E. 2nd 100, (1 Ind. Dec. 523)*.

The present appeal arises from the granting of a permanent injunction by the trial court upon a final trial. The appellee argues in this appeal that the appellant seeks to raise the same identical questions raised in the previous appeal from the interlocutory order granting the temporary injunction. In the briefs filed in both appeals, appellant states "What the issues were" in identical language, namely:

"Appellee, MORRIS MITNICK, doing business as CENTRAL FOURTH STREET DRUGS, filed its verified complaint for injunctive relief and $25,000.00 damages, which verified complaint was amended, charging that appellant was unlawfully picketing a certain store belonging to appellee. Appellant filed a verified answer containing denials and averring that the relief sought by appellee was prohibited by Indiana's Anti-Injunction Act; that appellant was engaged only in the peaceful dissemination of information regarding the labor dispute without fraud, violence or other unlawful acts, that appellant's acts were within the protection of the 14th Amendment to the Constitution of the United States of America, Article I, and Sections 9 and 31 of the Constitution of the State of Indiana."

The condensed recital of the evidence in each case is the same. On the hearing for a permanent injunction, each of the parties herein re-submitted the evidence heard by the trial court on the temporary injunction. No additional or new evidence was heard.

The constitutional question sought to be determined here was whether there was an infringement of the constitutional right to free speech and picketing. This same question was raised and considered in the previous appeal.

Under the circumstances, the principle known as the "law of the case" is applicable here. The decision of a court of appeals rendered upon a given state of facts becomes the law of the case applicable to such state of facts. Of course, upon a new trial, if new evidence is introduced and a new state of facts presented, we have a different case, and the trial court is not conclusively bound by the previous decision; but if the cause is submitted for a retrial upon the same facts upon which the decision was originally rendered, such decision remains the law of the case and the trial court

is bound thereby, as well as an appellate court on a subsequent appeal. Egbert v. Egbert, et al. (1956), 235 Ind. 405, 132 N. E. 2nd. 910; 2 I. L. E. Appeals, Sec. 478.

Appellant, however, contends that upon the hearing of the permanent injunction, as distinguished from the temporary injunction, there is a difference in the quantum of evidence requisite for the granting of the permanent injunction, namely, a preponderance of evidence in the final case, as distinguished from the making out of a prima facie case for holding the parties in status quo pending the hearing on the permanent injunction. 16 I. L. E., Injunctions, Sec. 96.

However, we on appeal will not weigh the evidence or determine its preponderance. Such duty is that of the trial court — not an appellate court. 2 I. L. E., Appeals, Sec. 571; Phillips v. Thorne (1885), 103 Ind. 275, 2 N. E. 747; Cooper, Administrator v. Williams (1887), 109 Ind. 270, 9 N. E. 917; Schrenker, Executor, etc. v. Grimshaw, et al. (1954), 124 Ind. App. 493, 119 N. E. 2nd. 432.

We find that no constitutional question is involved in this case, but merely the application of the principle of the "law of the case".

This cause is therefore remanded to the Appellate Court, with directions that it affirm the judgment of the trial court under the authority of this opinion. Jackson, J. concurs in result.

APPENDIX B

FAIR SHARE ORGANIZATION, INC.,
an Indiana Corporation, Appellant,

V.

Morris Mitnick, d/b/a Central Fourth Street Drugs, Appellee

No. 19741
Appellate Court of Indiana,
Division No. 2
March 19, 1963.

PFAFF, Judge.

This action was brought by the appellee to obtain a temporary injunction and a permanent injunction. The trial court granted a temporary injunction and upon the Appellee's request it entered Special Findings of Fact and Conclusions of Law. This appeal followed.

> "In appeals of this character the court is not concerned with the pleadings and will consider only the evidence which tends to support the judgment. It is not necessary that such a case shall be made as would entitle the plaintiff to relief at all events at the final hearing. It is enough if the evidence shows the case to be a proper one for investigation in a court of equity and that the facts are such that the thing sought to be enjoined shall be prevented until the final determination of the case.Tuf-Tread Corporation et al. v Kilborn (1930), 202 Ind. 154, 172 N. E. 353." Weist v. Dirks (1939), 215 Ind. 568, 20 N. E. 2nd. 969.

The Special Finding of Fact indicate that the appellee operated a retail drug store at 327 Franklin Street, Michigan City, Indiana, in which he employed four clerks and a Negro janitor. Approximately 15 percent of appellee's business was Negro trade. The

appellant is a non-profit organization existing under the laws of the state of Indiana for the following purposes: To awaken the Negro politically, economically, socially and civilly; to educate the Negro to vote intelligently and to foster and promote qualified candidates for positions irrespective of their party affiliation; to educate the Negro not to spend money where he cannot work; to cooperate wholeheartedly with every other organization which is working for the alleviation of race discrimination; and to employ all legal means necessary to accomplish these purposes.

The Findings further reveal that on September 27, 1961 the appellant, through its agents and representatives, made demand upon the appellee to employ a Negro as a clerk in his drug store even if appellee had to discharge a white clerk to do so. The appellant offered no specific persons for such employment. The appellee had no need for an additional clerk or clerks at this time; therefore, he refused the appellant's demand to hire a Negro clerk. The appellee did, however, offer to employ a Negro Pharmacist immediately if one were available. No member of the Negro race applied for a position with the appellee as a clerk in said drug store prior to the time of the demand made by the appellant on the appellee, and no Negro has applied for a position as a clerk since that time.

The Special Findings also state that beginning September 29, 1961, until the filing of this temporary injunction, the appellant picketed the appellee's place of business for purpose of coercing the appellee to employ a Negro as a clerk. The picketing was carried on by using from two to eight pickets; the number varied from time to time. In addition to these pickets, at different times, there were large numbers of the Negro race congregating near appellee's place of business. The appellant organization conducted the picketing by displaying and carrying some signs which were misleading and false in fact as follows:

"This Drug Store Discriminates Against Negroes."

"No Negro Clerk or Salesman in Michigan City."

"Help Us Fight Communism."

"This Store Does Not Hire Negro Help."

Further findings are to the effect that the purpose of the picketing was to intimidate customers from utilizing the services of appellee's business and the appellee suffered a loss in the volume of business in the sum of $5000.00 prior to the granting of the temporary injunction.

The trial court also found that the appellee offered to negotiate the differences between the parties but the appellant refused.

We think that the above set out Special Findings of Fact are supported by evidence and are not contrary to law.

In addition, the trial court specially found that no labor dispute exists between the appellee and his employees and that no labor dispute exists between the appellee and appellant. The first three points in the appellants argument challenge this particular finding. Appellant contends that this is a labor dispute and that the Appellate Court is the proper court for review.

(1) In determining its jurisdiction to hear this appeal the Appellate Court is bound by the Indiana Supreme Court decision, Fair Share Organization v. Kroger Company (1960), 240 Ind. 461, 165 N. E. 2nd 606, in which that court followed the United States Supreme Court ruling in New Negro Alliance et al v. Sanitary Grocery, Inc. (1938), 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012. These cases are almost identical with the case before us. In Fair Share Organization v. Kroger Company, supra, the Circuit Court granted a temporary injunction against picketing which the court found was designed to force the appellee to

change its employment practices and to engage in selective hiring of Negro employees based on the proportion of Negro customers who patronize its store. The appellant wanted these changes even if such modification required appellee to discharge or transfer competent white employees and replace them with Negroes. Appellant brought its appeal to this court and this court transferred it to the Supreme Court which court held that the action grew out of a labor dispute and that the Appellate Court was the proper court for review. The case then came back to the Appellate Court, Fair Share Organization v. Kroger Company (1961), 132 Ind. App. 160, 176 N. E. 2nd 205; however, by this time the appellee had dismissed the action. This court held the appeal to be moot.

Once an action granting an injunction is held to have grown out of a labor dispute the determination that this court had jurisdiction must follow. The Indiana Legislature has enacted a law modeled on the federal anti-injunction legislation, the Norris-LaGuardia Act, Act of March 23, 1932, ch. 90, 47 Stat. 70, 29 U. S. C. Sec. 101. This statute provides rules for the granting of an injunction in a labor dispute. See Sec. 40-501 et seq., Burns' 1952 Replacement. Since this action grew out of a labor dispute, the statute must be applied. The Appellate Court is given jurisdiction to review the granting and denial of such injunctions in one of the sections of the Indiana statute, Sec. 40-510, Burns' 1952 Replacement:

> "Whenever any court of the state of Indiana shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for cost, forthwith certify as in ordinary cases the record of the case to the Appellate Court for its review. Upon the filing of such records in the Appellate Court, the appeal shall be heard and the

temporary injunction order affirmed, modified, or set aside with the greatest possible expedition giving the proceedings precedence over all other matters except older matters of the same character."

The authorities and the statutes thus indicate that the appellant is correct as to both of its preliminary contentions, that is: (1) This action is one which has grown out of a labor dispute; and (2) the Indiana Appellate Court has statutory jurisdiction of appeals when the trial court grants an injunction in a labor dispute.

As its fifth and sixth points of argument, the appellant alleges that the evidence shows that the picketing was protected free speech and assembly under the Fourteenth Amendment of the United States Constitution and Article One, Sections Nine and Thirty-One of the Indiana Constitution. The appellee replies that he has no quarrel with the contention that the general rule is that picketing is protected free speech, but he further states that this protected right to picket cannot be used for unlawful purposes nor can it be carried on by unlawful means.

(2) A review of Indiana decisions reveals that the Indiana courts have repeatedly held that if the purpose of picketing is unlawful then the picketing itself is unlawful and it may be enjoined. It is not immune from injunctive relief under the terms of the Indiana Anti-Injunction Statute. Roth v. Local Union No. 1460 of Retail Clerks Union (1939), 216 Ind. 363, 24 N. E. 2nd 280; Fulford v. Smith Cabinet Mfg. Co. 1948), 118 Ind. App. 326, 77 N. E. 2nd 755; Bartenders, etc. Union Local 103 A. F. of L. of South Bend v. Clark Restaurants (1951), 122 Ind. App. 165, 102 N. E. 2nd 220; Murrin, etc. et al v. Cook Bros. Dairy, Inc. (1956), 127 Ind. App. 23, 138 N. E. 2nd 907.

The leading case upon which all the others rely is Roth v. Local Union No. 1460 of Retail Clerks Union,

supra. In that case the court stated that the appellant had performed all obligations imposed upon him by law, and he was at peace with his employees. None of them belonged to or wanted to become a member of the picketing union. The object of the picketing was to compel the appellant, against his desire, to sign a closed shop contract under the terms of which his employees would be compelled to join the union against their will or be discharged. Since forcing a worker into a union is against the positive law, the court affirmed the granting of the temporary injunction; however, they did make some modifications which are not relative here. In regard to our problem the court said at p. 368, 24 N. E. 2nd at p. 282:

> "Picketing becomes unlawful when either the object thereof or the means used is unlawful. Thus picketing for an unlawful purpose will taint and render unlawful acts done in furtherance thereof which would have been lawful if done for a legitimate purpose; and, conversely, a lawful objective will not justify the employment of means which are themselves unlawful. Local Union No. 26, National Brotherhood of Operative Potters v. City of Kokomo, (1937), 211 Ind. 72, 83, 5 N. E. 2nd 624, 108 A. L. R. 1111; McKay v. Retail Automobile Salesman's Local Union No. 1067, Cal. App. 1939, 89 P. 2nd 426; Id., Cal. App., 90 P. 2nd 113."

Decisions similar to those which enjoined picketing in Indiana have been handed down in other states and have reached the United States Supreme Court. In International Brotherhood of Teamsters Local 695, A. F. L. v. Vogt, Inc. (1957), 354 U. S. 284, 293, 77 S. Ct. 1166, 1171, 1 L. Ed. 2nd 1347, Justice Frankfurter in his opinion for the court reviews these cases in detail and concludes:

> "This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and

whether announced by its legislature or its court, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."

The appellee urges that the illegal or unlawful object of the picketing in the case before us is discrimination in employment in violation of the public policy of Indiana as set out in the Fair Employment Practices Act, Sec. 40-2308, Burns' 1952 Replacement (Supp.):

> "It is the public policy of the state of Indiana to encourage all of its citizens to engage in gainful employment and to encourage the full utilization of the productive resources of the state to the benefit of the state, the family and to all the people of the state.
>
> "The practice of denying employment to, and discriminating in employment against, properly qualified persons by reason of the race, creed, color, national origin or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state. The promotion of equal opportunity in employment without regard to race, creed, color, national origin or ancestry through reasonable methods that do not create that which it seeks to enjoin is the objectives and purposes of this act."

The appellee charges that the appellant is attempting to coerce him to violate this statute by discharging white employees because of their race. He alleges that he does not need any new clerks and the appellant demands that a Negro be hired.

A similar factual situation faced the California Supreme Court in Hughes v. Superior Court (1948), 32 Cal. 2nd. 850, 198 P. 2nd 885. The demand in that case was aimed at proportional hiring and there was no demand for the discharge of white employees. The Supreme Court held that there was no difference between a judicial and a legislative policy. They followed the

policy established in James v. Marinship (1944), 25 Cal. 2d 721, 155 P. 2d 329, 160 A. L. R. 900, a case in which the court struck down an attempt to establish simultaneously a closed shop and a closed union when the union did not admit Negroes.

There are two separate dissenting opinions in the Hughes v. Superior Court, supra, decision. One of these dissents is written by one of our country's outstanding jurists, Justice Traynor, and he clearly indicates that he would change his decision when faced with the situation before this court:

> "The picketing in this case is directed at persuading Lucky to take action that it may lawfully take on its own initiative. No law prohibits Lucky from discriminating in favor of or against Negroes. It may legally adopt a policy or proportionate hiring. The picketing confronts Lucky with the choice of adopting a policy that is not illegal in itself or risking the loss of patronage that may result from the picketing. Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky violate the law. Neither the Legislature nor the people have adopted such a statute, and I find no implication in the majority opinion that its equivalent exists under the common law of this state."

After the Supreme Court of California handed down its decision in Hughes v. Superior Court, supra, the case was taken before the Supreme Court of the United States, Hughes v. Superior Court (1950), 339 U. S. 460, 461, 70 S. Ct. 718, 719, 94 L. Ed. 985. Justice Frankfurter wrote the opinion for the court and he summed up the issues in the following language:

> "Does the Fourteenth Amendment of the Constitution bar a State from use of the injunction to

prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers?" The court held that the Fourteenth Amendment did not bar this California injunction, and in answer to the issue on p. 464, 70 S. Ct. on page 721 it said:

"To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations."

(3) The cases in this state clearly indicate that an injunction is proper, in spite of the Anti-Injunction Statute, when picketing is carried on for an illegal purpose. This court holds that picketing to obtain replacement of white employees by Negroes or any other attempt to obtain racial discrimination in employment is a violation of the public policy of this state

as set out in the Fair Employment Practice Act, Sec. 40-2308, Burns' 1952 Replacement (Supp.); therefore, such picketing has an illegal object or purpose.

As the fourth point in its argument appellant contends that the statutory conditions precedent to the granting of injunctive relief have not been complied with by the appellee, Sec. 40-501 et seq. Burns' 1952 Replacement. This point was at issue in Murrin, etc. et al. v. Cook Bros. Dairy, Inc., supra. In that case we held that if taken as a whole the findings legitimately support the judgment, then the decree, which grants the temporary injunction, should be upheld. The reason is that the evidence must merely show that the case is a proper one for investigation not that the plaintiff will necessarily be entitled to relief. The Special Findings of Fact indicate that the appellant attempted to force the appellee to do an act which is contrary to legislative public policy. The findings also show that the appellee was willing to negotiate. The law does not require more than this; the appellee will not be penalized if he fails to follow extensive legal procedures when he is coerced by means of picketing to violate the public policy of the state of Indiana.

(4) The appellant further urges that no peace officer was made a party as required by Sec. 40-507 (e), Burns' 1952 Replacement, and as a result the lower court would not have jurisdiction. In Weist v. Dirks (1939), 215 Ind. 568, 571, 20 N. E. 2nd 969, 970, our Supreme Court said:

> "In the latter respect, however, it is noted that there was no charge of the commission of any acts of violence or trespass against which a policeman or peace officer has power or authority to protect the plaintiff's property, and in such case the statute must be construed as not requiring any showing or finding as to the ability or willingness of a public officer to furnish adequate protection, or as requiring that the officer should be made a

party, since there is no necessity for inquiry as to whether such officer is willing or able to protect the plaintiff's property."

Thus this court holds: (1) It has jurisdiction to hear this appeal, because the Supreme Court of Indiana has declared that a dispute arising from picketing to obtain employment of a member of a particular race is a "labor dispute"; (2) picketing of this nature can properly be enjoined because its object is contrary to a specific policy established by statute; and (3) an injunction can be granted even though every detail of the Anti-Injunction Act has not been technically followed when there is substantial compliance with the statute and the picketing is designed to coerce another to commit acts which violate the clear public policy of the state. The appellant, therefore, has failed to establish error by the record to obtain reversal of the decree below, and it is unnecessary to consider the appellee's contention that the picketing was carried on in an unlawful manner.

Judgment affirmed.

MOTE, P. J., and HUNTER, J., concur; KELLEY, J., not participating.

APPENDIX C

UNITED STATES AMENDMENT 14

1. CITIZENSHIP — DUE PROCESS OF LAW — EQUAL PROTECTION. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

BURNS' INDIANA STATUTES, 1952 REP., VOL. 8 PART 1 — INJUNCTIONS IN LABOR DISPUTES — CONTRACTS CONCERNING UNION MEMBERSHIP

40-501. ISSUANCE OF INJUNCTIONS RESTRICTED. — No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act (Sections 40-501 — 40-514) — nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act. (Acts 1933, ch. 12, Section 1, p. 28)

40-502. PUBLIC POLICY OF STATE DECLARED. — In the interpretation of this act (Sections 40-501 — 40-514) and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefor, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion

of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted. (Acts 1933, ch. 12, Sec. 2, p. 28)

40-504. INJUNCTIONS AND RESTRAINING ORDERS — WHEN NOT ISSUED. — No court of the state of Indiana shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section three (Section 40-503) of this act. (Acts 1933, ch. 12, Sec. 4, p. 28)

40-506. ACTS OF OFFICERS AND AGENTS OF ASSOCIATIONS — LIABILITY FOR. — No officer or member of any association or organization, participating or interested in a labor dispute, shall be held responsible or liable in any court of the state of

Indiana for the unlawful act of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after knowledge thereof. (Acts 1932, ch. 12, Sec. 6, p. 28)

40-507. INJUNCTIONS — TESTIMONY AND BASIS FOR ISSUING — TEMPORARY RESTRAINING — BOND. — No court of the state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof; * * *

40-508. INJUNCTIVE RELIEF — WHEN DENIED. — No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. (Acts 1933, ch. 12, Sec. 8, p. 2)

40-509. INJUNCTION — FINDING OF FACTS — LIMITATION ON PROHIBITION — No restraining or . r temporary or permanent injunction shall be gra. d in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (Acts 1933, ch. 12, Sec. 9, p. 28)

40-510. REVIEW BY APPELLATE COURT. — Whenever any court of the state of Indiana shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on the filing the usual bond for cost, forthwith certify as in ordinary cases the record of the case to the Appellate Court for its review. Upon the filing of such records, in the Appellate Court, the appeal shall be heard and the temporary injunction order affirmed, modified, or set aside with the greatest possible expedition giving the proceedings precedence over all other matters except older matters of the same character. (Acts 1933, ch. 12, Sec. 10, p. 28)

APPENDIX E

MATERIAL SECTIONS OF PETITIONER'S BRIEF IN THE SUPREME AND APPELLATE COURTS OF INDIANA AND PAGE NUMBERS IN PARENTHESIS

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VI.

BRIEF SUMMARY OF ARGUMENT

May It Please The Court.

It would be tragic — tragic, indeed, if the chains binding labor could be reinforced by the uncorrobora ted testimony of capital, particularly where an employer advertised for a cosmotician and clerk approximately five days prior to confrontation of an organized group demanding the employment of a Negro clerk. It is undisputed that for more than 15 years appellee had failed to employ a Negro in any other position than a janitor. It is equally irrefutable that the appellee was in need of a cosmotician and clerk and one or more members of the appellant-organization knew that appellee had placed an ad in the Michigan City News-Dispatch for the purpose of attracting a qualified cosmotician and clerk.

Without disrespect, appellant submits that the case at bar reminds one of the early days in England when the word of a lord out weighed all of his subjects, likened unto the dark history of America when the minority had no legal rights that the majority was bound to respect.

This case is further unique in that injunctive relief was granted without one scintilla of evidence that the organization either participated in or ratified any alleged unlawful signs or illegal acts after knowledge of the statement concerning discharging a white person and employing a Negro; also appellee failed to come

into court with clean hands after more than six week of picketing.

In conclusion, it is without serious doubt and lamentable that the end results in Indiana of this permanent injunction against Negro citizens who attempted to exercise free speech and association under both the U. S. and Indiana Constitutions, with utter disregard for compliance with the Indiana Anti-Injunction Statute, would be to impede and tend to stifle all further protests and redress of grievances.

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POINT II

THE SPECIAL FINDINGS OF FACTS THEREIN ARE NOT SUSTAINED BY THE EVIDENCE AND ARE CONTRARY TO LAW

Based upon the facts set out in Point 1, the following special findings of fact are not sustained by the evidence, and are illustrations of the fact that appellee failed to come into court with clean hands.

Special Finding of Fact No. 4 states that the plaintiff did not, and does not now, discriminate against members of the Negro race in matters of employment. (S. Tr. p. 319, l. 26-l. 28)

Appellant submits that it is difficult to ascertain how this statement can be reconciled with the undisputed fact that appellee had been in business for 15 years with approximately 15% Negro business and had employed only a Negro janitor for 4 hours on Saturdays during the evenings for 6 years. (Tr. p. 62, l. 4 to l. 30) That he placed a blind ad for an experienced cosmotician and clerk in the Michigan City Dispatch Newspaper (Tr. p. 104, l. 7 to p. 105, l. 1), and when he was approached on September 27, 1951, without stating in good faith that he needed a qualified cosmotician and clerk, retorted that he would employ a Negro pharmacist that same afternoon if one could be presented.

Evidence of appellee's further bad faith is reflected in the following statement: "I didn't have to put it in writing as my word was good as a business man", (Tr. p. 109, l. 1 to p. 110, l. 10) and the further fact that Dr. Wendell G. White, Negro pharmacist, made an application two years prior to the picketing, left his address and phone number, frequented the drug store, but was never hired for the position. (Tr. p. 99, l. 1 to l. 24 and Tr. p. 246, l. 18 to Tr. p. 256, l. 11 to l. 26)

Special Finding of Fact No. 6 states that the plaintiff had no need for an additional clerk or clerks at said time and therefore refused defendant's demand to hire Negro clerks; that plaintiff at said time offered to employ a Negro pharmacist immediately if one was available. (S. Tr. p. 320, l. 8-l. 12)

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Appellant submits that there was no need for an additional clerk at the time certain members of the Fair Share Organization, Inc. approached appellee on September 27, 1961, concerning the employment of a Negro clerk is not supported by the evidence. (Tr. p. 122, l. 9 to l. 17)

Special Finding of Fact No. 11 states that the defendant conducted said picketing by displaying and carrying signs which are misleading and false in fact as follows:

"This Drug Store Discriminates Against Negroes"
"No Negro Clerk Or Salesman In Michigan City"
"Help Us Fight Communism"
"Unfair To Negroes"
"This Store Does Not Hire Negro Help" (S. Tr. p. 321, l. 1 to l. 9)

In Spicklemier v. Chambers (1943), 113 Ind. App. 470, 47 N. E. 2nd 189, the yardstick for testing signs was expressed in the following language:

"The test of falseness seems to be whether the facts asserted by the banners have the effect, intentionally or otherwise, of misrepresenting the facts of or involved in or connected with the controversy."

This was a case in which the appellant sought injunctive relief against allegedly false banners carried by picketts stating "Unfair to Organized Labor." The court held that the term had a well understood meaning; that it neither said nor implied that the one picketed was unfair to all organized labor rather than to the particular union involved; that it advertises and in the court's opinion is now generally understood to advertise the existence of a controversy between the one being picketed and organized labor and someone or more of its several branches, but not necessarily all organized labor.

The sign "No Negro Clerk Or Salesman In Michigan City" appeared on the first day of the picketing and the words "In Michigan City" were masked and eliminated from the sign on that date. (Tr. p. 200, l. 11 to l. 17)

Plaintiff's Exhibit No. 2, (Tr. p. 291) shows that there was no evidence of threat and future use of the sign as it read before these words were eliminated as would justify injunctive relief.

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"Help Us Fight Communism" is merely a slogan which appears only on the truck and which actually reads "Join Fair Share Crusade — Americans Help Us To Stop Communism", (Tr. p. 296) and "Join The Fair Share Organization — Help Us Fight Communism". (Tr. p. 297)

Appellant urges that this is a generally understood and highly respected expression and is not false and misleading. It further contains no inference what-

ever involving plaintiff or his place of business. It merely infers that segregation and discrimination breeds communism and that appellant is attempting to destroy the soil on which communism grows.

Appellant earnestly contends that the remaining three signs mentioned in the findings of fact were used together with other signs stating "Don't Buy Segregation" (Tr. p. 290), "We Want Equal Opportunities", "No Negro Clerk Or Salesman" (Tr. p. 291), "United We Stand" (Tr. p. 292), "The Fair Share Organization — Help Fight Segregation — Join Now" (Tr. p. 293), "This Store Doesn't Hire Negro Help" (Tr. p. 300), "Don't Spend Your Money Where You Can't Work In Positions of dignity" (Tr. p. 294), "You Can Help Us Toward Equal Job Opportunities By Staying Out" (Tr. p. 295), "Central Drug Store Discriminates Against Negroes in Michigan City" (Tr. p. 298), and could not possibly be misunderstood as expressions of what the controversy between appellant and appellee was all about, especially when these signs were used along with the distribution of handbills, appellant's "Exhibit A." (Tr. p. 301)

In Baker v. Retail Clerk's Union, 1942, 313 Ill. App. 432, 40 N. E. 2nd 571, the court, although confronted with evidence that plaintiff had no clerk and no union but was represented by the defendant union to observe opening and closing hours, held that a banner on which was printed "This Store Unfair To Organized Labor" was protected under the right to freedom of speech guaranteed by the Federal Constitution and it reversed the decree of the Circuit Court.

In Edjomac Amusement Corporation v. Empire State Motion Picture Operators Union, 1939, 273 N. Y. 617, 8 N. E. 2nd 329, the court denied an injunction in the case where signs were carried by pickets stating "This Theater Does Not Employ Members of Stage Employees Union", although there was a contention that the signs should have also stated that the theater

employs union labor to operate motion picture machines.

Still further, in 43 C. J. S., Section 143-B and U. S. Cafeteria Employees Union Local 302 v. Angelos, 64 S. Ct. 126, 320 U. S. 293, the court held that words like "unfair or fascist" were considered as undefined slogans or loose language.

Special Finding of Fact No. 12, (S. Tr. p. 321, l. 9-11) states that plaintiff offered to negotiate the differences between the parties but defendant refused to negotiate.

Appellant submits that this ultimate fact is not supported by the evidence, which becomes clearer upon reviewing appellee's testimony:

Q. Did you have any other conversation with Mr. Arthur Simpson or Mr. Leon Coleman after the day the picketing started ?

A. After the picketing started ?

Q. Uh-huh

A. About 4 hours after the picketing strated Mr. Simpson and a reporter from the Gary newspaper came to talk to me and asked if I wanted to mediate.

Q. Mediate?

A. Yes.

Q. What is your answer to that ?

A. I said, "What is there to mediate ?" (Tr. p. 113, l. 11 to l. 22)

Continuing the appellee's testimony, we find the following:

Q. Now, Mr. Mitnick, since the inception of this picketing, or prior thereto, did you at any time seek the assistance of the Fair Employment Conferences Commission of the State of Indiana?

A. I did not.

Q. Since the beginning of the picketing — subsequent or prior thereto — did you try to solicit the services of any other governmental agency to assist you in this matter ?

A. I did not.

Q. Prior to the picketing, or subsequent thereto, have you at any time attempted in any way to discuss any kind of settlement of this matter with the parties involved?

MR. FRANCESCHINI: I object to the question, because it is the same question he asked a while ago when our objection was sustained by the court, in regard to negotiation concerning this thing they claim is a labor dispute.

THE COURT: But suppose he did negotiate ? Overruled.

A. I did not. (Tr. p. 125, l. 8 to l. 28)

Appellant urges that the material facts found are not sustained by the evidence and other facts necessary to sustain the issue were not found by the court and the findings are silent as to this fact; therefore, it is regarded as not proved and is in effect a negative finding against the party having the burden of proof.

CHICAGO, ETC. R. CO. V. GLOVER (1902) 159 IND. 166, 62 N. E. 11

SHED V. AMERICAN MAZI PRODUCTS COMPANY, 1915, 60 IND. APP. 146, 108 N. E. 610

BOYER V. LEAS, 1946, 116 IND. APP. 502, 642 N. E. 2ND 38

Further, since the sufficiency of the evidence to sustain these special findings are wanting and the findings were not in accordance with the evidence, although the facts were found by the trial court in favor of the party with the burden of proof, the question is herewith raised under this section of the argument and will hereinafter be raised again under another point dealing with the Anti-Injunction Statute.

DORWEILER V. ROSEBUSH-SINKS, 1958 128 IND. APP. 532, 148 N. E. 2ND 570,

TRANSFER DENIED, 238 IND. 368, 151 N. E. 2ND 142

GROSS INCOME TAX DIVISION V. SURFACE COMBUSTION CORPORATION, 1953, 232

IND. 100, 11 N. E. 2ND [illegible], CERTIORARI DENIED, 74 SUP. CT. 51

MC COY V. FARM BUREAU MUTUAL INSURANCE COMPANY, 1953, 123 IND. APP. 421, 11 N. E. 2ND 728

Regrettably, it is obvious by the appellee's testimony and the many inconsistencies shown by the record, as for example: "I did say that I would not hire anybody, white or Negro, as long as they were picketing", (Tr. p. 106, l. 13 to l. 18), that appellee did not come into court with clean hands. Does the record reflect that appellee complied with the ancient and venerable maxim: "He who comes into equity must come with clean hands"? Appellant submits that it does not!

And in keeping with its position urge that the trial court should have first determined whether the complainant was free from taint before considering the question as to whether he had been wronged.

HUMPHREYS-MEXIA CO. V. ARSENEAUX, 1927, 116 TEX. 603, 297 S. W. 225

BROTHERHOOD OF RAILROAD TRAINMEN V. TOLEDO P. & W. RAILROAD (1944) 321 U. S. 50

Miller V. Kraus, (Cal. App. 1915), 155 P. 834, 838 834, 838

(154 - 155)

Appellant submits that the record, and specifically the court's findings of fact in this cause is completely void of a showing of the required "due and personal notice" of the hearings involved in this cause to the chief of police or similar officer in any manner, nor has the trial court directed such notice; that this is a jurisdictional deficiency and omission as vitally as if involving a party against whom relief is sought.

As argued to the trial court (Tr. p. 158, l. 7 to l. 20) there is a total lack of evidence of the defendant corporation's participation in, authorization or ratification of the acts of the persons picketing. It must be borne in mind that the injunctive relief was not against Leon Coleman, Jr., an officer, who is alleged to have made the unlawful statement, which was not substantiated by the signs. In fact, the signs seemed to indicate that the pickets were attempting to advertise a policy of discrimination.

Sections 40-508, Burns' Anno. Statutes, 1952 Rep., provides as follows:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in a labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.".

In General Electric Company v. Gojack, 68 Fed. Sup. 686, while interpreting a similar provision of the Federal Anti-Injunction Act, the court in substance held that the employer was not entitled to injunctions in cases growing out of labor disputes, notwithstanding that it was shown that executives and supervisors were not prevented from entering its plants because of illegal picketing by union employees; and that police charged with protecting employer's property were derelict in their duties, where it did not appear that the employer had made a good faith effort to settle the dispute by negotiation.

Appellant submits that negotiation requires more than a mere willingness to discuss a problem. As ably stated in Webster's New Dictionary, page 482, it means **to treat with another respecting purchase and sale; to hold intercourse in bargaining or trade * * *.**

(Appellant's Emphasis)

"To hold intercourse in bargaining or trade" presupposes a subjective state of mind, which is manifested in good faith. This state of mind, appellant respectfully submits, was clearly manifested contrary to the special findings of fact.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 346

FAIR SHARE ORGANIZATION, INC.,
Petitioner,

vs.

MORRIS MITNICK, D/B/A CENTRAL FOURTH STREET DRUGS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

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THE WINTHROP WARREN PRINTING COMPANY, INC., N.Y.C.

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CITATIONS.

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CITATIONS TO OPINIONS BELOW.

Respondent accepts Petitioner's statement of opinions below and the grounds for invoking jurisdiction of this Court for Writ of Certiorari to the Supreme Court of the State of Indiana.

QUESTION PRESENTED.

Respondent respectfully submits that Petitioner's statement of the question presented is not completely accurate. He believes that the question here is as follows: Does the Fourteenth Amendment bar the State of Indiana from the

of injunction to prohibit Petitioner from picketing Respondent's place of business solely to secure compliance with Petitioner's demand that Respondent discharge a white clerk and hire a negro in his stead, without regard to qualifications of either, when such demand would be in violation of the public policy of the State of Indiana as expressed in its Fair Employment Practices Act of 1961.

STATUTES INVOLVED

In addition to statutory provision set forth in Petitioner's Brief, page 3 and printed in Appendix D thereof, pages 15A-17A, there is also involved Indiana's Fair Employment Practices Act, Section 40-2308 *et seq.* (Burns' Ind. Stat. Anno., 1952 Repl. (Supp.)); printed in Appendix A hereof, *infra*, page ".

STATEMENT OF FACTS

The Petitioner's statement of facts is not a fair statement of the facts upon which the trial and appellate courts founded their decisions. Petitioner has attempted in its statement to assert as facts evidence given on the trial, which, from a perusal of the Special Findings of Facts of the trial court, indicate that such evidence was not believed by the trier of the facts. It is attempting again, against every principle of appellate jurisprudence, to have the appellate tribunal, including this, weigh the evidence and determine the credibility of the testimony given on the trial by the various witnesses.

Respondent respectfully submits that a fair statement of the facts which sustain the decisions of the trial and appellate courts of Indiana, are as follows:

That the Fair Share Organization, Inc., a non-profit corporation, was organized for the following purposes: to

awaken the Negro politically, economically, socially and civilly; to educate the Negro to vote intelligently and to foster and promote qualified candidates for position irrespective of their party affiliation; to educate the Negro not to spend money where he cannot work; to cooperate wholeheartedly with every other organization which is working for the alleviation of race discrimination; and to employ all legal means necessary to accomplish these purposes.

That the parent organization and main office was maintained in the City of Gary, County of Lake and State of Indiana.

That it organized a chapter in the city of Michigan City as an offspring of the main corporate body and appointed as its agents, Arthur Simpson, independent chairman (Tr. p. 160), Leon Coleman, Jr., Republican chairman, and Delmar Worlds, Democratic chairman (Tr. p. 163), on September 21, 1961.

That on September 27, 1961, Petitioner, through these officers, made demand upon the Respondent to employ a Negro as a clerk in his drug store, even if Respondent had to discharge a white clerk to do so. Petitioner offered no specific person for such employment. Respondent, at the time the demand was made, had no opening for a clerk. He therefore refused Petitioner's demand. No member of the Negro race had ever applied for employment as a clerk prior to the time of the demand by Petitioner and no Negro has applied for a position as a clerk since that time. At the time the initial demand was made upon Respondent, Respondent offered to hire a Negro pharmacist if they would produce one. Petitioner's officers refused Respondent's offer.

Subsequent to this activity, Petitioner picketed Respondent's place of business. While the picketing was in progress, Arthur Simpson, the alleged independent chairman

of Petitioner organization, accosted Respondent in the presence of two Negro newspaper reporters for the purpose of negotiating the dispute with Respondent. Respondent offered to negotiate if he could have a newspaper reporter from the Michigan City News-Dispatch present during the discussion, which offer was refused. The picketing continued with from two to seven pickets being used from time to time. The pickets carried signs which were removed from the interior of a truck owned by Petitioner and which truck bore Petitioner's name on its sides. The picketing so affected Respondent's business, that he sustained a loss therefrom.

HOW FEDERAL QUESTION IS PRESENTED.

Respondent concedes that Petitioner attempted at various stages of the proceedings herein to invoke the protection of the Fourteenth Amendment to the Constitution of the United States but submits that there is no federal question involved herein.

REASONS FOR DENYING THE WRIT.

A.

(Addressed to Proposition "A", Petitioner's Brief, p. 8.)

Respondent concedes Petitioner's proposal stated under "A" on Page 8 of its brief.

B 1.

(Addressed to Proposition "B 1", Petitioner's Brief, p. 10.)

Petitioner asserts that the decisions of the Indiana Appellate and Supreme Courts, which are based upon and follow the case of this Court in *Hughes v. Superior Court*

(1950), 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985, are in conflict with the decisions of this Court in *New Negro Alliance et al. v. Sanitary Grocery Company, Inc.* (1938), 303 U. S. 552. Respondent respectfully submits that there was no conflict between these decisions. Petitioner misconstrues the decision of this Court in *New Negro Alliance et al. v. Sanitary Grocery Company, Inc.* The only matter decided by this Court therein was one of jurisdiction of the federal courts to issue injunctions to restrain a Negro organization which demanded of Sanitary Grocery Company, Inc., that it change its hiring practices so as to include Negroes among its employees. In the light of the Norris-LaGuardia Act, which specifically deprived the federal courts jurisdiction from issuing injunctions in cases involving labor disputes, this Court merely stated that a group of Negroes who united for the purpose of obtaining recognition for employment came within the purview of the definition contained in the Norris-LaGuardia Act as a "labor dispute"- nothing more. This Court made no attempt nor is there any apparent evidence from the opinion that the question of the lawfulness or unlawfulness of the demand was considered or raised.

In the instant case, which is bottomed on the *Hughes v. Superior Court, supra*, the Indiana Appellate Court, and affirmed by the Supreme Court of Indiana, has reaffirmed a principle of Indiana law that even where there is a labor dispute as defined in Indiana's "Little Norris-LaGuardia Act", if the purpose of the picketing is unlawful, the Indiana Anti-Injunction Statute does not deprive an Indiana court of power to issue an injunction to restrain such acts.

It will be noted that Petitioner has studiously avoided mentioning in its brief the existence of the Indiana Fair Employment Practices Act, Section 40-2308 *et seq.* (Burns' Ind. Stat. Anno. 1952 Repl. (Supp.)), which clearly enun-

ciates the public policy of the State of Indiana that no person shall be denied employment because of his race, creed or color. Clearly in this case and on the record herein, Petitioner has taken the position that Respondent must hire a Negro because of the color of his skin, not because of any qualifications. Respondent submits that this demand of Petitioner is just as discriminatory as the situation where a person is denied employment because of the color of his skin, his religion or his ethnic background.

Petitioner further asserts that where there is a total lack of evidence to support a court's decision, a court of appeal has the responsibility of examining the record and reversing the decision and cites a number of decisions of this Court to that effect on Page 11 of its brief. Respondent has no argument with this sound principle of law. However, it will be noted that, in raising this question, Petitioner is asking this Court to review the evidence and determine the credibility of the witnesses. This is not supported by the cases of this Court cited by Petitioner at Page 11 of its brief.

On the question of whether or not there was any evidence to support the Special Findings of Fact that the purpose of the picketing was illegal, *i.e.*, demanding that Respondent fire a white clerk and hire a Negro in his stead, the following is an extract of the evidence of the Respondent, Morris Mitnick, and Delmar Worlds, given on the trial of this cause:

> "A. They asked me if I would employ a Negro in my store. I said yes, I would, that as a matter of fact I was in need of a pharmacist and I would employ a Negro pharmacist, that if they would get me one I would employ him immediately that same afternoon. And they said a Negro pharmacist has dignity, and they were not concerned about that. They wanted a clerk in my store. I says, well, I didn't need a clerk. They said, 'Well, we want a clerk in your store.' I

said, 'I still don't understand. You are making a demand you want a clerk. I don't need a clerk, Negro or white. I need a pharmacist.' They said, 'Well, fire a white one and hire a Negro.' And then we stopped the conversation." (Tr., p. 65, l. 17 to l. 30.)

"Q. Now, Mr. Mitnick, who was carrying on this conversation?

"A. Mr. Coleman was carrying on most of the conversation.

"Q. Do you know who made the statement, 'Fire a white clerk and hire a Negro'?

"A. Mr. Coleman did.

"Q. What further conversation was had at that time?

"A. Mr. Coleman told me I did 95 percent of my business, approximately, with the Negroes, and therefore I should employ a Negro, even if I had to fire a white man. I asked him where he got the information. He says, 'Oh, we know all about it. We know you do 95 percent of your business with Negroes.' How he got that, I don't know.

"Q. What further conversation was had, if any?

"A. By that time, I guess I got a little sore, and told them inasmuch as 85 percent of my business, approximately, was with whites and about 15 percent with Negroes, that I could get along without the Negro business but I could not get along without the white, and I cannot fire a white clerk to hire a Negro any more than fire a Negro and hire a white." (Tr., p. 66, l. 1 to l. 23.)

"*Direct Examination.* DELMAR P. WOODS, a witness for Appellant:

"Q. What, if anything, did Mr. Mitnick say to that?

"A. Mr. Mitnick said that he has nothing against hiring Negroes; he would hire a pharmacist now. And at this time Mr. Coleman asked him if he would put this in writing, and he said no. I asked Mr. Mitnick would he hire a clerk, and Mr. Mitnick replied he did not need a clerk." (Tr., p. 234, l. 18 to l. 22.)

Respondent respectfully submits that the decision of the Indiana Appellate and Supreme Courts is in full conformity with the opinion of this Court as expressed by Justice Frankfurter in *Hughes v. Supreme Court*, *supra*, as follows:

> "... the due process clause of the fourteenth amendment of the Constitution of the United States does not preclude California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert that policy."

B 2.

(Addressed to Proposition "B 2", Petitioner's Brief, Page 11.)

Petitioner asserts the decision of the Indiana courts in the instant case is erroneous and in conflict with *Karges Furniture Company v. Amalgamated Woodworkers' Local Union No. 131* (1905), 165 Ind. 421, 75 N. E. 877. A complete discussion of this case would unduly prolong this brief and serve no purpose. Respondent would observe, however, that if there is any conflict between the instant case and *Karges Furniture Company v. Amalgamated Woodworkers' Local Union No. 131* (*supra*), it is the prerogative of the Indiana courts, if they so desire, to overrule any of their decisions. Petitioner has failed to show how a federal question is raised by their proposition.

B 3.

(Addressed to Proposition "B 3", Petitioner's Brief, Page 12.)

Respondent does not in any way question Petitioner's right of free speech and assembly, nor have any of the courts of the State of Indiana in any way denied it such

prerogatives, so long as Petitioner exercises its rights of free speech and assembly without doing violence to the public policy and law of the State of Indiana, as enunciated in Indiana's Fair Employment Practices Act. It cannot, under the cloak and guise of civil rights assert or demand greater rights than any other citizen or person of the United States. For the foregoing reasons, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

RAYMOND M. FOX, JR.,
CARL M. FRANCESCHINI,
Attorneys for Respondent.

APPENDIX A.

BURNS' INDIANA STATUTES, 1952 Repl., Vol. 8, Fair Employment Practices Act, Sec. 40-2308:

"It is the public policy of the state of Indiana to encourage all of its citizens to engage in gainful employment and to encourage the full utilization of the productive resources of the state to the benefit of the state, the family and to all the people of the state.

"The practice of denying employment to, and discriminating in employment against, properly qualified persons by reason of the race, creed, color, national origin or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state. The promotion of equal opportunity in employment without regard to race, creed, color, national origin or ancestry through reasonable methods that do not create that which it seeks to enjoin is the objectives and purposes of this act."